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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-5908

LEON CHAMBERS,
Petitioner,

vs.

STATE OF MISSISSIPPI,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

BRIEF FOR THE RESPONDENT

OPINION BELOW

The Opinion of the Supreme Court of Mississippi is reported at 252 So.2d 217 (Miss. 1971).

JURISDICTION

Certiorari was granted by this Court on March 20, 1972. Chambers was released on bail on February 14, 1972. 30 L.Ed.2d 773.

STATEMENT OF FACTS

Leon Chambers was indicted in the Circuit Court of Wilkinson County for the murder of Aaron Liberty. A change of venue was granted and Chambers was tried and convicted in the Circuit Court of Amite County, Mississippi.

For his conviction Chambers was sentenced to serve life in the State Penitentiary.

On the night of June 14, 1969, in the Town of Woodville, Mississippi, Aaron Liberty, a black part-time policeman, was shot in the back and side four times. Woodville Policemen Forman and Liberty had gone to Hayes' Cafe to arrest C. C. Jackson, against whom an affidavit had been made and an arrest warrant issued. A crowd of 20 or 30 blacks prevented the officers from arresting Jackson. Deputy Sheriff Gordon Geter, Waldo Welch and Herman Anthony responded to a call for help by Forman.

At the time of the shooting Geter was in the middle of the street facing Liberty, who had his back to the alley. A volley of five or six shots was fired from the alley, four of which hit Liberty in the back and side. Liberty turned toward Welch and told him that he (Liberty) had been shot. Welch told him to "kill him", whereupon Liberty turned toward the alley and fired two shots down the alley. Liberty appeared to take deliberate aim on his second shot. The second shot hit Chambers in the head and neck. Liberty collapsed and was taken to the hospital where he was found to be dead on arrival.

About five months later, on November 10, 1969, Gable McDonald was taken to the law office of Mullins and Smith in Natchez, Mississippi, by Reverend Stokes, a black preacher, and in the presence of Attorneys Mullins, Smith and West, Attorneys for Chambers, and in response to questions propounded by them, McDonald, an illiterate black, confessed that he shot Officer Liberty with a .22 caliber revolver. The statement was typed up, read by West to McDonald, and then signed by mark and sworn to by McDonald.

McDonald was arrested and placed in jail where he remained until a preliminary hearing before a Justice of the Peace on December 9, 1969. McDonald completely repudiated his confession. He testified that he was told by Stokes that if he would confess to the killing of Liberty that the town would be sued and that he (McDonald) would receive one third of the money.

At Chambers' trial McDonald was called as a defense witness. He was allowed to testify about his confession, Reverend Stokes' promise to him and his subsequent repudiation of that confession. He testified that he did not kill Liberty and had nothing whatsoever to do with the killing. The court overruled Chambers' motion to examine McDonald as an adverse witness.

Deputy Sheriff Geter testified for the State that he was facing Liberty at the time he was shot, and that he saw Chambers shoot Liberty in the back and he saw Chambers with the gun in his hand.

Deputy Sheriff Welch testified that he saw Chambers break his right hand down, and immediately thereafter heard five or six shots fired, but he did not actually see the gun in Chambers' hand.

Sammy Hardin testified for the defense that he saw Gable McDonald shoot Liberty.

Albert Carter, called as a witness for the defendant, testified that on the day after the shooting Gable McDonald came to his house. After the jury had been excluded, Carter testified that later on, on that Sunday, he went to McDonald's house, and that McDonald stated that he had shot Liberty.

On appeal, the Supreme Court of Mississippi held that the trial court's action of excluding the testimony of Carter

and Turner was proper in that it was hearsay. The Supreme Court held that the case went to the jury on conflicting evidence and that the evidence supported the verdict.

From that decision Chambers petitioned this Court for certiorari which was granted.

QUESTIONS PRESENTED

Did the trial court deny Chambers of his Sixth Amendment right of confrontation and Fourteenth Amendment right to due process in excluding the hearsay testimony of two witnesses that they had heard a third party (McDonald) confess that he shot Liberty when in fact McDonald took the witness stand and admitted that he had previously confessed?

Did the trial court deny Chambers of his Sixth Amendment right of confrontation by ruling that McDonald was not an adverse witness in that he did not accuse Chambers of the crime, that Chambers was not surprised by McDonald's testimony, particularly in view of the fact that Chambers was allowed to question McDonald extensively and was not denied the right to ask any question?

ARGUMENT

A.

The Trial Court Properly Excluded Hearsay Evidence.

At the trial below Leon Chambers called Gable McDonald as a defense witness. McDonald testifed extensively as to his out-of-court confession, his subsequent repudiation of that confession and his actions and conduct on the night of the murder of Aaron Liberty.

Chambers then called Albert Carter and Berkley Turner as defense witnesses. Carter and Turner were allowed to testify out of the presence of the jury that Gable McDonald had confessed to them that he had shot Aaron Liberty. The trial court refused to allow this testimony to go to the jury, and Chambers now contends that action resulted in a denial of the right of confrontation.

The exclusion of Carter and Turner was in accord with the decisions of this Court. In *Donnelly* v. *United States*, 228 U.S. 243, 33 S.Ct. 449, 57 L.Ed. 820 (1913), this Court held that it was well settled by decisions of this Court and the state courts that evidence of confessions of third parties, made out of court, and exonerating the accused should be excluded. The basis of the decision was that the statements were mere hearsay.

Chambers contends that the rule is not in accord with the modern trend. However, as recent as *United States* v. *Harris*, 403 U.S. 573, 91 S.Ct. 2075, 29 L.Ed.2d 723 (1971), this Court recognized *Donnelly* as possibly requiring the exclusion of out-of-court declarations against interest made by one other than the defendant. Justice Harlan, in a dissenting opinion, joined by Justices Black, Brennan and Marshall, stated that declarations against penal interest do not fall within the hearsay exceptions. The criticism of *Donnelly* was thus recognized but not accepted.

The United States Court of Appeals for the District of Columbia refused to overrule *Donnelly* in *United States* v. *Alexander*, 430 F.2d 904 (CADC 1970). In *Scolari* v. *United States*, 406 F.2d 563 (CA9 1969), the Ninth Circuit found that the "great weight of authority" is against the admission of declarations against penal interest by parties other than the defendant.

Chambers contends that half the circuits have already abandoned the rule; however, a reading of cases cited by Chambers in no way confirms the contention.[1]

At the time of Chambers' trial the rule in Mississippi was identical to the rule of *Donnelly* in that testimony going to show out-of-court confessions and admissions on the part of third persons is hearsay and is inadmissible in exculpation of those on trial for a crime. *Brown* v. *State*, 99 Miss. 719, 55 So. 961 (1911). In expressing the State interest in and the reasoning behind its ruling the Supreme Court of Mississippi stated:

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1. In *United States* v. *Seyfried*, 435 F.2d 696 (CA7 1971), cert. denied 402 U.S. 912, 91 S.Ct. 1393, 28 L.Ed.2d 654 (1971) the Court did not reach the question as to whether *Donnelly* would be followed, and there was no allegation that compliance with *Donnelly* would reach a constitutional issue. In *Scolari* v. *United States*, 406 F.2d 563 (CA9 1969), cert. denied 395 U.S. 981, 89 S.Ct. 2140, 23 L.Ed.2d 769 (1969), the court found that *Donnelly* was the greatest weight of authority, and followed it even though it had been criticized. In *United States* v. *Dovico*, 261 F.Supp. 862 (S.D.N.Y. 1966), aff'd 380 F.2d 325, cert. denied 389 U.S. 944, 88 S.Ct. 308, 19 L.Ed.2d 302 (1967), the Court of Appeals held the case was not proper for a determination as to whether a declaration against penal interest should be an exception to the hearsay rule. In *United States* v. *Annunziato*, 293 F.2d 373 (CA 1961), cert. denied 368 U.S. 919, 82 S.Ct. 240, 7 L.Ed.2d 134 (1961), no reference was made to *Donnelly* and it was recognized that statements against interest do not relate to statements only against penal interest." In *Mason* v. *United States*, 257 F.2d 359 (CA10 1958), cert. denied 358 U.S. 831, 79 S.Ct. 52, 3 L.Ed.2d 69 (1958), the court found no declaration against penal interest and did not decide on the *Donnelly* rule. In *Sucher Packing Company* v. *Manufacturing Casualty Insurance Company*, 245 F.2d 513 (CA6 1957), cert. denied 355 U.S. 956, 78 S.Ct. 541, 2 L.Ed.2d 531 (1958), a civil case, the Court noted that *Donnelly* might not be applicable only to criminal cases and did not hold the third party declaration against penal interest admissible.

> All one defendant would have to do would be to admit that his guilty accomplice was innocent and that he himself had perpetrated the crime, absent himself so as to enable the party on his trial to have the benefit of his admission, and, after his acquittal, appear, demand his trial, and prove by the evidence of the acquitted party that he was in fact the guilty person. *Brown* v. *State*, 99 Miss. 719, 727, 55 So. 961 (1911).

The commentators agree that the majority rule is that an admission or confession of a stranger that he committed the offense with which the defendant is charged should be excluded.[2] To change the rule would work a travesty on justice.[3]

The trial court properly refused to allow Carter and Turner to testify that they had heard Gable McDonald confess to the murder of Aaron Liberty as their statements were mere hearsay and McDonald was not under oath at the time he made such statements, if, in fact, he did.

Further, it must be remembered that Gable McDonald was called as a defense witness and admitted that he had previously confessed to the murder of Aaron Liberty. That alone was sufficient to exclude the testimony of Carter

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2. McCormick, Law of Evidence, p. 549 (1954); Jones on Evidence, Section 296 (1958); 5 Wigmore, Evidence, Section 1476; Wharton's Criminal Evidence, Section 253 (12th ed.).

3. If the rule were changed, A could be charged with the crime; B could tell C and D that he committed the crime; B could go into hiding and at A's trial C and D would testify as to B's admission of guilt; A could be acquitted and B would return to stand trial; B could then provide several witnesses to testify as to his whereabouts at the time of the crime. The testimony of those witnesses along with A's statement that he really committed the crime could result in B's acquittal. A would be barred from further prosecution because of the protection against double jeopardy. No one could be convicted of perjury as A did not testify at his first trial, B did not lie under oath, and C and D were truthful in their testimony.

and Turner as the availability of the declarant is an additional ground for excluding his extrajudicial confession. *Jones* v. *United States*, 400 F.2d 134 (CA9 1968); *Smith* v. *United States*, 106 F.2d 726 (CA4 1939); *United States* v. *Mulholland*, 50 F. 413 (CADC).

Even in the absence of the rationale of *Donnelly* the trial court properly excluded the hearsay testimony of Carter and Turner in that the proper predicate for their testimony was not laid. When the proper foundation is laid, Mississippi admits testimony regarding prior inconsistent statements of a witness. *Bonelli* v. *Bowen*, 70 Miss. 142, 149, 11 So. 791 (1892). In laying the proper predicate the witness must be asked if he made a prior inconsistent statement and then he must be given a chance to explain the inconsistencies. *McCormick*, Law of Evidence, Section 37 (1954).

Chambers did not question McDonald as to whether he had confessed to Carter and Turner and in the absence of such a foundation the hearsay testimony was properly excluded.

McDonald testified extensively as to his out-of-court confession, his repudiation of that confession, and the circumstances surrounding it. He did not deny having made the confession. The testimony of Carter and Turner was properly excluded as hearsay; likewise the proper predicate was not laid for their testimony and McDonald was never given the opportunity to admit or deny the making of such statements. If the statements were made they were unsworn and pure hearsay. McDonald, the declarant, was available and did testify. Further, the testimony of Carter and Turner would have been only cumulative in that McDonald freely admitted that he had previously confessed to the crime.

B.

The Right of Confrontation Is Limited to Witnesses Against the Accused.

The right of confrontation, as expressed by the Sixth Amendment and made applicable to the State by way of the Fourteenth Amendment reads: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

By the language of the Constitution the "confrontation" provision refers not to all witnesses but to "witnesses against." This limitation of the right was noted by the United States Court of Appeals for the Sixth Circuit in *United States* v. *Beasley,* 438 F.2d 1279 (CA6 1971), wherein it was held that a witness is not a witness "against" the accused when his testimony is not "accusatorial", and in the absence of accusatorial testimony the right of confrontation does not apply. That the right of confrontation applies to witnesses "against" an accused rather than "for" the accused was noted by the United States Court of Appeals for the Second Circuit in *United States* v. *Bujese,* 434 F.2d 46 (CA2 1970).

It becomes apparent in the decisions of this Court that the right of confrontation is not absolute. In *California* v. *Green,* 399 U.S. 149, 155-156, 90 S.Ct. 1930, ..., 26 L.Ed.2d 489, 495, 496 (1970), this Court stated that "merely because evidence is admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion that confrontation rights have been denied." As pointed out by the concurring opinion of Chief Justice Burger, historically: "The confrontation clause was meant to constitutionalize a barrier against flagrant abuses, trial by anonymous accusers, and absentee witnesses." 399 U.S. at 179, 26 L.Ed.2d at 509.

In *Dutton* v. *Evans*, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970), Evans, Truett and Williams were charged with murder. Truett, the principal prosecution witness at the trial, detailed the circumstances of the murder. Shaw, one of twenty prosecution witnesses, testified that he and Williams had been fellow prisoners. Shaw testified that Williams was carried to court for arraignment. Upon returning, Williams was asked "how he made out in court". Shaw testified that Williams responded that if it had not been for Evans "we wouldn't be in this now." This Court held that in view of the circumstances the accomplice's statement was not "crucial" or "devastating", and the admission of the testimony did not deny the right to confront witnesses against the accused.

Chambers claims he was limited to direct examination of Gable McDonald and the trial court's failure in refusing to hold McDonald to be an "adverse" witness denied his right of confrontation. However, McDonald did not accuse Chambers of the murder for which he was being tried, his testimony was not accusational, and he did not point the finger of guilt at Chambers. Chambers was in no way denied a right of confrontation. As McDonald was called as a defense witness the holding of the Supreme Court of Tennessee in *State* v. *Bomer*, 179 Tenn. 67, 162 S.W. 2d 515, 520 (1942), is applicable:

> The constitutional provision that the accused hath the right to meet the witness face to face 'has no application to witnesses summoned in behalf of a defendant.'

Chambers called McDonald as a defense witness and now alleges that the Mississippi evidentiary rule limiting him to direct examination is arbitrary and unreasonable. The rule in Mississippi is that a party, including the prosecution, may cross-examine its own witnesses after showing

that the evidence as given has taken him by surprise and that the witness is hostile. *Hooks* v. *State*, 197 So.2d 238 (Miss. 1967).

Chambers had examined McDonald under oath at a preliminary hearing and the testimony elicited at trial was the same as that given at the preliminary hearing. McDonald's testimony was not surprising to Chambers; likewise, it was not hostile as it was not accusatorial, nor was McDonald unwilling to answer Chambers' questions fully and completely.

The Mississippi rule as to cross-examining a party's own witness is identical to that approved by the federal courts. In *Culwell* v. *United States*, 194 F.2d 808 (CA5 1952), the general rule was stated as follows:

> It is the established rule that impeachment of one's own witness may be resorted to where his testimony has surprised the party offering him. However, the impeaching matter is to be limited to the point of surprise and even where this is a real surprise it is not proper to permit the impeachment testimony to go beyond the only purpose of which it is admissible, i.e., the removal of damage the surprise has caused. 'In no event may the fact that a witness has made contradictory statements be used as it in effect was here, as a basis for completely discarding the rules of evidence against hearsay and ex parte statements, and, as impeachment, opening the floodgates of prejudicial and damaging hearsay.'

In *Bateman* v. *U. S.*, 212 F.2d 61 (9th Cir. 1954), the Court held that the party introducing a witness should not be allowed to impeach its witness where the witness's testimony did not surprise nor prejudice the party by whom he was introduced. In the case at bar Chambers was not

surprised by McDonald's testimony and could not have been prejudiced by it.

The defense may not call a witness who has not testified merely to attempt to discredit him in the course of eliciting adverse testimony. *Beasley* v. *United States*, 218 F.2d 366 (CADC 1954), 94 U.S. App. D.C. 406, cert. denied, 349 U.S. 907, 75 S.Ct. 584, 99 L.Ed. 1243

In any event, the technical description of the manner of questioning would seem unimportant. McDonald appeared as a defense witness and answered all questions asked. Chambers had full opportunity to confront McDonald and no attempt at impeachment was denied. Chambers was not refused the opportunity to ask any questions. The fact that the questioning was technically direct examination was sufficient to justify the confrontation clause of the Sixth Amendment. In *United States* v. *Griffin*, 434 F.2d 978 (CA9 1970), an accusatorial witness was called by the defense and answered all questions asked. The United States Court of Appeals for the Ninth Circuit held that there was full opportunity to "confront", even though the confrontation was by direct not cross-examination.

Chambers was not denied the opportunity to ask McDonald any question. Chambers was free to inquire into any matter and he cannot predicate error on his failure to avail himself of an opportunity. *United States* v. *Peterson*, 435 F.2d 192 (CA7 1970). In *Peterson*, a witness named Bartemio testified as to Rachel's out-of-court admissions as to her and Peterson's guilt. Peterson had a right to confront Rachel. Peterson called Rachel as his witness and the Court held that the right of confrontation was afforded. The right of confrontation was afforded even though Rachel was called as a defense witness and there was no cross-examination.

CONCLUSION

Leon Chambers was afforded every constitutional right. He was allowed to call McDonald as a witness and McDonald freely admitted having previously confessed to the crime. The jury heard the testimony. The jury was not allowed to hear the testimony of Carter and Turner that they had heard McDonald confess. That occurrence was pure hearsay and the declarant was not "unavailable" as he had previously testified. Chambers was not limited in his examination of McDonald.

Respondent submits no right of confrontation was denied and if there were any errors they were harmless beyond a reasonable doubt. *Chapman* v. *California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

Respectfully submitted,

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CERTIFICATE

I, Timmie Hancock, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, five copies of the foregoing Brief of Respondent to Honorable Ramsey Clark and Honorable Peter Westen, Attorneys at Law, 1775 K Street, N.W., Washington, D. C. 20006, Counsel for Petitioner.

This the 1st day of August, A. D., 1972.

Timmie Hancock
Special Assistant Attorney General